No. 14-9358

In the

Supreme Court of the United States

Avondale Lockhart,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

Petition for a Writ of Certiorari

Edward S. Zas (Counsel of Record)
Daniel Habib
Assistant Federal Defenders

Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
E-mail: Edward_Zas@fd.org
Tel.: (212) 417-8742

Attorneys for Petitioner

Question Presented

Section 2252(b)(2) of title 18, U.S.C., requires a district court to impose a prison term of at least ten years on a defendant convicted of possessing child pornography if he "has a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."

The question presented is whether § 2252(b)(2)'s mandatory minimum sentence is triggered by a prior conviction under a state law relating to "aggravated sexual abuse" or "sexual abuse," even though the conviction did not "involv[e] a minor or ward," an issue that divides the federal courts of appeals.

Table of Contents

Page

Question Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Relevant Statutory Provisions 1

Statement of the Case 4

Reasons for Granting the Petition 13

A. The decision below deepens a circuit conflict over whether a prior state conviction involving an adult enhances a defendant's sentencing range under § 2252(b)(2) and materially identical penalty provisions. 14

B. This case is an ideal vehicle and the question is important. 24

C. The decision below is wrong. 26

Conclusion 32

Appendix

Opinion and Order of the United States Court of Appeals for the Second Circuit, *United States v. Lockhart*, No. 13-602-cr, filed May 15, 2014 ..... APP 01

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing, *United States v. Lockhart*, No. 13-602-cr, filed Oct. 16, 2014 ..... APP 20

Transcript of Sentencing, *United States v. Lockhart*,
No. 11 Cr. 231 (SJ), United States District Court
for the Eastern District of New York, dated Feb. 1, 2013 ..... APP 21

Judgment in a Criminal Case, *United States v.*
Lockhart, No. 11 Cr. 231-SJ, United States District Court
for the Eastern District of New York, filed Feb. 13, 2013 ..... APP 33

Table of Authorities

Cases

Barnhart v. Thomas,
540 U.S. 20 (2003) 29

Clay v. United States,
537 U.S. 522 (2003) 21

Descamps v. United States,
133 S. Ct. 2276 (2013) 25

Flores-Figueroa v. United States,
556 U.S. 646 (2009) 27

Jama v. Immigration and Customs Enforcement,
543 U.S. 335 (2005) 27

Paroline v. United States,
134 S. Ct. 1710 (2014) 26, 28, 29

Porto Rico Ruy., Light & Power Co. v. Mor,
253 U.S. 345 (1920) 26, 28, 29

Shepard v. United States,
544 U.S. 13 (2005) 16, 17, 18, 25

South Carolina v. White,
605 S.E.2d 540 (2004) 16

Taylor v. United States,
495 U.S. 575 (1990) 16

United States v. Bass,
404 U.S. 336 (1971) 27, 29

United States v. Beardsley,
691 F.3d 252 (2d Cir. 2012) 24

United States v. Becker,
625 F.3d 1309 (10th Cir. 2010) 11, 23, 25

United States v. Farmer,
627 F.3d 416 (9th Cir. 2010) 15

United States v. Hubbard,
480 F.3d 341 (5th Cir. 2007) ..... *passim*

United States v. Hunter,
505 F.3d 829 (8th Cir. 2007) 11, 19, 20, 21

United States v. Linngren,
652 F.3d 868 (8th Cir. 2011) 19, 20, 22

United States v. Mateen,
764 F.3d 627 (6th Cir. 2014) (en banc) ..... *passim*

United States v. Mateen,
739 F.3d 300 (6th Cir.), *vacated*,
764 F.3d 627 (6th Cir. 2014) (en banc) 18

United States v. McCutchen,
419 F.3d 1122 (10th Cir. 2005) 11, 22, 23, 25

United States v. Rezin,
322 F.3d 443 (7th Cir. 2003) 15, 22, 29

United States v. Roy,
114 F. Supp. 2d 1 (D. Me. 2000) 20

United States v. Sinerius,
504 F.3d 737 (9th Cir. 2007) 15, 18, 19, 22

United States v. Sonnenberg,
556 F.3d 667 (8th Cir. 2009) 20

United States v. Spence,
661 F.3d 194 (4th Cir. 2011) ..... *passim*

United States v. Trogdon,
339 F.3d 620 (8th Cir. 2003) 19, 20, 21, 25

United States v. Weis,
487 F.3d 1148 (8th Cir. 2007) 19, 20, 21, 25

United States v. Wiles,
642 F.3d 1198 (9th Cir. 2011) 19

Federal Statutes

18 U.S.C. § 1202(a) 27, 28

18 U.S.C. § 1461 30

18 U.S.C. § 1464 30

18 U.S.C. § 1591 30

18 U.S.C. § 2241 12

18 U.S.C. § 2242 12

18 U.S.C. § 2243 12

18 U.S.C. § 2251(e) 2, 26

18 U.S.C. § 2252(a)(4)(B) 4, 6

18 U.S.C. § 2252(b)(1) 2

18 U.S.C. § 2252(b)(2) ..... *passim*

18 U.S.C. § 2252A(b)(1) 3, 17, 18

18 U.S.C. § 2252A(b)(2) 3, 15, 16, 20

18 U.S.C. § 2259(b)(3) 28

18 U.S.C. § 3231 1

18 U.S.C. § 3742 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

State Statutes

Minn. Stat. § 609.3451, subdivision 1. 20

Mont. Code Ann. § 45-5-502 18

N.Y. Penal Law § 130.65(1) 7

Ohio Rev. Code § 2907.05 17

Okla. Stat. tit. 21, §§ 42, 1123(A)(1) 17

Other Authorities

S. Rep. No. 104-358, 104th Cong., 1996 WL 506545 (1996) 27, 31

U.S. Sentencing Comm'n, *2013 Sourcebook of Federal Sentencing Statistics* tbl.13, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table13.pdf 26-27

Petition for a Writ of Certiorari

Petitioner Avondale Lockhart respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The Second Circuit's opinion is reported at 749 F.3d 148 and appears at Appendix ("App.") 1-19. The Second Circuit's order denying panel rehearing and rehearing en banc appears at App. 20. The transcript of petitioner's sentencing proceeding in the Eastern District of New York appears at App. 21-32. The judgment of conviction appears at App. 33-42.

Jurisdiction

The district court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on February 13, 2013. The Second Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, entered judgment on May 15, 2014, and denied a timely petition for rehearing and rehearing en banc on October 16, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Statutory Provisions

Section 2251 of title 18, U.S.C., provides, in relevant part:

> Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse,

> sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years.

18 U.S.C. § 2251(e).

Section 2252(b)(1) of title 18, U.S.C., provides:

> Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

18 U.S.C. § 2252(b)(1).

Section 2252(b)(2) of title 18, U.S.C., provides, in relevant part:

> Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but ... if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 2252(b)(2).

Section 2252(A)(b)(1) of title 18, U.S.C., provides:

> Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

18 U.S.C. § 2252A(b)(1).

Section 2252A(b)(2) of title 18, U.S.C., provides, in relevant part:

> Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but ... if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 2252A(b)(2).

Statement of the Case

This case presents an ideal opportunity for the Court to resolve an acknowledged circuit conflict over an important and recurring question of statutory interpretation. Petitioner pleaded guilty in the United States District Court for the Eastern District of New York to possessing child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). That offense ordinarily carries no minimum prison sentence and a ten-year maximum term. But Section 2252(b)(2) requires a prison term of at least ten years (and increases the maximum prison sentence from ten to twenty years) if the defendant "has a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."

Petitioner had a prior New York State conviction for sexual abuse involving his adult girlfriend but not "involving a minor or ward." Nevertheless, the district court concluded that § 2252(b)(2)'s enhanced penalties applied and sentenced petitioner to the ten-year mandatory minimum term.

The Second Circuit affirmed, joining the Fourth, Fifth, Sixth, and Ninth Circuits in holding that the phrase "involving a minor or ward" modifies only the immediately preceding phrase "abusive sexual conduct." Consequently, under this interpretation, a prior state conviction "relating to aggravated sexual abuse or sexual abuse" that involves an adult victim, such

as petitioner's prior conviction, is a § 2252(b)(2) predicate. The Second Circuit acknowledged the Eighth Circuit's contrary view that any prior state sex-abuse conviction must involve a minor to trigger § 2252(b)(2)'s heightened sentencing range. The majority position disregards the statute's plain text and Congress's manifest intent to limit qualifying state predicates to crimes against children. This conflict, on an important question of statutory interpretation with significant consequences for criminal defendants and the uniform administration of federal criminal law, warrants this Court's review.

1. In 2010, aware that petitioner had once sent funds to a money courier for a company that distributed child pornography, federal law enforcement agents targeted petitioner in a sting. Officials mailed a letter to petitioner's home inviting him to purchase child pornography through a government-run website or mail-order catalogue. Petitioner ordered six DVDs described as depicting sexually explicit content involving children, paying with a $125 money order. The agents obtained a warrant to search petitioner's home. When petitioner accepted delivery from an undercover agent of a package said to contain the videos, other agents executed the warrant. They recovered nine videos and 15,000 images containing child pornography from the hard drive of petitioner's laptop computer.

Petitioner was 46 years old at the time of his arrest. He was born in Dominica and has lived in the U.S. Virgin Islands and the U.S. as a lawful permanent resident since he was seven. He lived principally in the New York

City area and worked as an aerobics instructor and bus driver until kidney disease, caused by years of heavy drinking, left him disabled. Petitioner also suffers from diabetes and deep-vein thrombosis. In 2007, petitioner underwent a kidney transplant and was homebound during his convalescence. Although he had maintained several long-term romantic relationships with women in the past, petitioner's illness kept him from engaging in sexual activity. While recuperating at home, petitioner bought a computer, his first, and grew addicted to readily available Internet pornography. Initially, petitioner viewed only adult pornography, but started responding to pop-up advertisements for child pornography and began viewing that material as well. Nonetheless, petitioner has never had sexual contact with a child. And a psychiatric evaluation prepared in connection with his sentencing concluded that petitioner was "not a pedophile, ... nor does he have any other paraphilia or hypersexual disorder."

2. Petitioner pleaded guilty in the Eastern District of New York to possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). That offense ordinarily carries a statutory range of imprisonment of zero to ten years, but a ten-year mandatory minimum and a twenty-year maximum apply if a defendant "has a prior conviction ... under the laws of any State

relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252(b)(2).[1]

Petitioner's Presentence Report ("PSR") calculated an advisory U.S. Sentencing Guidelines range of 78–97 months. But the PSR also concluded that petitioner's prior New York State conviction for sexual abuse subjected him to § 2252(b)(2)'s ten-year mandatory minimum and thus recommended a 120-month sentence. In 2000, petitioner had pleaded guilty to sexual abuse in the first degree, in violation of N.Y. Penal Law § 130.65(1), which provides: "A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact ... [b]y forcible compulsion." An arrest report in that case reflects that petitioner pinned down the victim, his 53-year-old girlfriend, held her wrists, ripped off her underpants, and attempted to penetrate her vagina with his penis. Petitioner was sentenced to five years' probation.

At his federal sentencing, petitioner objected to the application of the ten-year mandatory minimum, arguing that his prior conviction was not a

---

[1] In full, § 2252(b)(2)'s enhanced sentencing range applies if a defendant "has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." Materially identical language appears in 18 U.S.C. §§ 2251(e) (penalties for production of child pornography), 2252(b)(1) (receipt and distribution of child pornography), 2252A(b)(1) (receipt and distribution of child pornography), and 2252A(b)(2) (possession of child pornography).

qualifying predicate because it did not "involv[e] a minor or ward." The district court (Hon. Sterling Johnson, Jr.) disagreed, ruling that "the plain reading of the statute negates that particular position" because petitioner's conduct "fits within that part of the statute that speaks of a state conviction for aggravated sexual abuse." App. 23. The court sentenced petitioner to the ten-year mandatory minimum, finding that term "sufficient, after considering the factors in [§] 3553(a)." App. 28.

3. The Second Circuit (Katzmann, C.J., joined by Straub and Lohier, JJ.) affirmed. App. 1-19. The court held that the phrase "involving a minor or ward" modifies only "abusive sexual conduct," such that a state conviction "relating to aggravated sexual abuse or sexual abuse" is a § 2252(b)(2) predicate even if it involves an adult victim only.

The Second Circuit began by considering "which rule of statutory construction should inform our understanding of the phrase 'relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor': the last antecedent rule or the series qualifier canon." App. 7. Respondent urged application of the last antecedent rule, according to which "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." App. 7 (citations omitted). Under that rule, "involving a minor or ward" would modify only the immediately preceding antecedent, "abusive sexual conduct." Petitioner, in contrast, urged application of the series qualifier canon, which "provides that a modifier at

the beginning or end of a series of terms modifies all the terms." App. 8 (citation omitted). The series qualifier canon applies where "the modifying clause appears at the end of a single, integrated list, ... undeniably applies to one antecedent, and makes sense with all." App. 8 (citations and alterations omitted). Under that rule, "involving a minor or ward" would modify all three categories of state offenses: "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct."

Based on "the language and structure of this statutory phrase alone," the Second Circuit was "not fully persuaded that either canon applies unambiguously." App. 9. Cutting against petitioner's view, for example, was the fact that the list of predicate state-law offenses "itself falls in the middle of a longer list of qualifying predicate crimes; that is, the modifier does not end the list in its entirety." App. 9. Similarly, the court of appeals rejected petitioner's position that the three types of state sex offenses formed a "continuum of conduct," each element of which should be modified by "involving a minor or ward." App. 10. On that reading, the court observed, "'abusive sexual conduct involving a minor' seemingly would encompass anything that constitutes 'sexual abuse involving a minor,'" offending the rule against surplusage. App. 10-11. But the Second Circuit also rejected Respondent's argument that the absence of a comma between "abusive sexual conduct" and "involving a minor or ward" proved that "involving a minor or ward" was meant to be read only with "abusive sexual conduct." App. 11.

Although a comma separating a modifying phrase from a list often indicates the drafter's intent that the phrase modify all elements of the list, not just the last antecedent, that rule is not "hard and fast," and a comma was "grammatically unnecessary." App. 11-12.

Finding neither canon dispositive, the Second Circuit turned to "the remainder of § 2252(b)(2) and ... its overall scheme." App. 13. Section 2252(b)(2) also lists as predicates prior convictions under "this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice)." App. 13. Those statutes "prohibit sexual conduct, including conduct that may have both minor and adult victims." App. 13. The court of appeals deemed it "important[]" that "§ 2252(b)(2) does not specify that a conviction under a federal statute must involve a minor; a violation of any of these statutory provisions constitutes a predicate offense ... regardless of the age of the victim." App. 14. The Second Circuit embraced the reasoning of other courts of appeals that "'it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law.'" App. 14 (quoting *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011), and citing similar analyses from the Fifth, Seventh, and Ninth Circuits). On the strength of that argument, the Second Circuit concluded that "'involving a minor or ward' modifies only prior state convictions for 'abusive sexual conduct,' not those for 'sexual

abuse' or 'aggravated sexual abuse,' each of which would constitute a predicate *federal* offense if committed against an adult or a child." App. 15.

The court of appeals acknowledged that the Sixth, Eighth, and Tenth Circuits had reached "the opposite conclusion, namely that the phrase 'involving a minor or ward' modifies all three categories of state sexual abuse crimes." App. 15.[2] But, the Second Circuit said, the Eighth and Tenth Circuits had "drawn this conclusion without elaborating on their reasoning. Indeed, these circuits appear merely to have assumed that a prior state-law sexual abuse conviction requires a minor victim for purposes of the enhancement, an assumption that made little difference in those cases since the predicate violations at issue involved minor victims." App. 15-16 (citing *United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007); *United States v. McCutchen*, 419 F.3d 1122, 1125 (10th Cir. 2005)).

Finally, the Second Circuit rejected petitioner's argument that Congress had limited state-law predicate offenses in this and related sentencing-enhancement provisions to offenses involving minors, such that the same limitation was applicable to "aggravated sexual abuse" and "sexual abuse." *See* 18 U.S.C. §§ 2252(b)(2) (state offenses involving "child

---

[2] The en banc Sixth Circuit later held that "involving a minor or ward" modifies only "abusive sexual conduct." *United States v. Mateen*, 764 F.3d 627, 628–29 (6th Cir. 2014) (en banc). Also, as discussed below, *see infra* pp. 22–23, the Tenth Circuit has suggested that the question "whether the sexual abuse of adults would qualify as a predicate offense under § 2252(b)" remains open in that court. *United States v. Becker*, 625 F.3d 1309, 1312 n.3 (10th Cir. 2010).

pornography"), 2251(e) (state offenses relating to "sex trafficking of children"). The court of appeals allowed that there was "some logic to this position," but found it no more reasonable than "the assumption that Congress would intend for courts to treat prior sexual abuse convictions similarly, regardless of whether the conviction was under federal or state law." App. 17. That view was reinforced, the Second Circuit thought, by comparing the three categories of state-law predicates to their federal analogues: 18 U.S.C. §§ 2241 (aggravated sexual abuse), 2242 (sexual abuse), and 2243 (sexual abuse of a minor). Aggravated sexual abuse and sexual abuse apply to adults and minors; only sexual abuse of a minor requires a minor victim, suggesting that "Congress intended to impart a similar structure to state-law predicate offenses" under § 2252(b)(2). App. 18.

The Second Circuit denied panel rehearing and rehearing en banc. App. 20.

Reasons for Granting the Petition

The Court should grant certiorari to resolve the acknowledged conflict over the important and recurring question of federal statutory interpretation at the heart of this case. In the decision below, the Second Circuit recognized that it was deepening an existing split over whether a prior state conviction involving an adult victim serves to enhance a defendant's minimum and maximum sentences under § 2252(b)(2) and analogous provisions. The Second Circuit's affirmative answer, while consistent with decisions of the Fourth, Fifth, Sixth, and Ninth Circuits, conflicts with the Eighth Circuit's rule that only convictions involving minors qualify. The Tenth Circuit has indicated that the question is unresolved but suggested unease with the majority position.

This pure question of statutory interpretation warrants this Court's review. The question is of substantial practical importance, as the answer has significant consequences for many criminal defendants and affects the uniform administration of federal criminal law. This case offers an ideal vehicle because the question is preserved, the answer will have a substantial effect on petitioner's sentence, and the parties do not dispute the circumstances of petitioner's prior conviction, which involved a victim who was, and was known to be, an adult. On the merits, the Second Circuit's position is wrong because it disregards the statute's plain text and Congress's

manifest intent to limit qualifying state predicates to crimes against children. The petition should be granted.

A. The decision below deepens a circuit conflict over whether a prior state conviction involving an adult enhances a defendant's sentencing range under § 2252(b)(2) and materially identical penalty provisions.

The Second Circuit's decision exacerbates a conflict among the courts of appeals over whether a prior state conviction involving an adult serves to enhance a defendant's mandatory minimum and maximum sentence under § 2252(b)(2) and materially identical provisions.[3] Several courts have acknowledged the conflict. *See, e.g.*, App. 15 (op. below); *United States v. Mateen*, 764 F.3d 627, 632 (6th Cir. 2014) (en banc). This Court's review is warranted to resolve the split.

1. **The majority position**: Five circuits—the Second, Fourth, Fifth, Sixth, and Ninth—have held that the phrase "involving a minor or ward" modifies only "abusive sexual conduct," such that a prior conviction involving an adult is a predicate offense if it "relat[es] to" "aggravated sexual abuse" or "sexual abuse." App. 19 (2d Cir.); *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011) ("[W]e conclude that 'aggravated sexual abuse,' 'sexual abuse,' and 'abusive sexual conduct involving a minor' are three distinct categories of

---

[3] The operative statutory language appears not only in § 2252(b)(2), but also in §§ 2251(e) (increasing sentencing range for production of child pornography from 15–30 years to 25–50 years); 2251(b(1) (increasing range for transporting, receiving, or distributing child pornography from 5–20 years to 15–40 years); 2252A(b)(1) (same as § 2252(b)(1)); and 2252A(b)(2) (same as § 2252(b)(2)).

predicate state law offenses set forth in 18 U.S.C. § 2252A(b)(2)."); *United States v. Hubbard*, 480 F.3d 341, 350 (5th Cir. 2007) ("[Section] 2252A(b)(1) does not require aggravated sexual abuse or sexual abuse of a minor. Read in context, the phrase 'involving a minor' modifies only 'abusive conduct.'"); *United States v. Mateen*, 764 F.3d 627, 628-29 (6th Cir. 2014) (en banc) ("[T]he phrase 'involving a minor or ward' ... modifies only 'abusive sexual conduct' and, accordingly, only state crimes relating to abusive sexual conduct need involve a minor or ward in order to trigger enhancement under § 2252(b)(2)."); *United States v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007) ("Section 2252A(b) requires an enhanced sentence if [the defendant's prior] conviction is as an offense 'relating to' either 'aggravated sexual abuse,' 'sexual abuse,' or 'abusive sexual conduct involving a minor.'"); *see also United States v. Farmer*, 627 F.3d 416, 418 (9th Cir. 2010) ("As its text makes clear, § 2252A(b)(2) refers to three separate offenses: "'aggravated sexual abuse, sexual abuse, and abusive sexual conduct involving a minor [or ward].'").

In dicta, the Seventh Circuit has agreed. *United States v. Rezin*, 322 F.3d 443, 448 (7th Cir. 2003) (dismissing defendant's argument that "'involving a minor' in section 2252(b)(2) qualifies not just 'abusive sexual conduct' but also 'aggravated sexual abuse' and 'sexual abuse' because "it would have been strange had Congress on the one hand authorized heavier punishment for offenders who had a prior *federal* conviction for a sexual

crime whether or not it involved a minor, and on the other hand insisted that if the prior conviction had been for a state offense, even one identical to one of the enumerated federal offenses, the victim had to be a minor").

Under the majority position, neither the elements nor the underlying facts of a defendant's prior state offense need establish that the victim was a minor, as long as the conviction "relat[es] to" "aggravated sexual abuse" or "sexual abuse." Consequently, like the Second Circuit below, other courts on the long side of the split have affirmed application of the enhancement absent judicially cognizable evidence of the victim's minor status.

a. For example, in *Spence*, the Fourth Circuit held that the defendant's conviction under South Carolina common law for assault and battery of a high and aggravated nature triggered § 2252A(b)(2)'s enhancement because it "relate[d] to sexual abuse," even though nothing established that the victim was a minor. 661 F.3d at 200. The Fourth Circuit first applied the categorical approach, *see Taylor v. United States*, 495 U.S. 575 (1990), and concluded that the defendant's prior offense was not a categorical match because South Carolina law defined the offense only as "an unlawful act of violent injury accompanied by circumstances of aggravation." 661 F.3d at 199 (quoting *South Carolina v. White*, 605 S.E.2d 540, 543 (2004)). Because some "circumstances of aggravation" would relate to sexual abuse but others would not, the Fourth Circuit applied the modified categorical approach and consulted the indictment to ascertain how the

defendant had committed his prior offense, *see Shepard v. United States*, 544 U.S. 13 (2005). The Fourth Circuit determined that the defendant had "touch[ed] the victim between her legs, which constitutes indecent liberties with a female," and that there was "a difference in the sex and a great disparity in the ages and physical conditions between [the defendant] and the victim." *Id.* at 199–200. Those circumstances sufficed to trigger the enhancement because they established that the defendant's prior was both abusive and sexual, even though they did not establish that the victim was a minor. *Id.*

b. Similarly, in *Hubbard*, the Fifth Circuit upheld application of § 2252A(b)(1)'s enhancement based on the defendant's prior conviction under Oklahoma law for attempting to make lewd or indecent proposals to engage in sexual relations with a person he believed to be a minor, but who was actually an adult undercover agent. 480 F.3d at 343 & n.1 (citing Okla. Stat. tit. 21, §§ 42, 1123(A)(1)). The court of appeals rejected the defendant's argument that only an offense involving an actual minor could trigger the enhancement, reasoning that "§ 2252A(b)(1) does not required aggravated sexual abuse or sexual abuse of a minor." *Id.* at 350. Rather, "[r]ead in context, the phrase 'involving a minor' modifies only 'abusive conduct.'" *Id.*

c. In *Mateen*, the en banc Sixth Circuit held that the defendant's prior conviction for gross sexual imposition under Ohio law did not need to involve a minor to qualify as a § 2252(b)(2) predicate. 764 F.3d at 628–29. The

statute under which the defendant had been convicted, Ohio Rev. Code § 2907.05, contained several subsections, some of which required that the victim be a minor and some of which did not. However, no documents judicially noticeable under *Shepard* established the subsection to which the defendant had pleaded or the victim's age. 764 F.3d at 629–30; *see also United States v. Mateen*, 739 F.3d 300, 307–08 (6th Cir. 2014) (vacated panel opinion). Nonetheless, the court of appeals held that the defendant's prior conviction could qualify if it "relat[ed] to" "aggravated sexual abuse" or "sexual abuse," regardless of the victim's age, and remanded for the district court to make that determination. 764 F.3d at 633.

d. Finally, in *Sinerius*, the Ninth Circuit upheld application of the enhancement on the basis of the defendant's prior conviction for sexual assault under Montana law without taking into account whether the victim was a minor. 504 F.3d at 744 ("Since we conclude that [the defendant's] prior Montana conviction categorically qualifies as 'sexual abuse' for purposes of § 2252A(b), we need not consider whether the conviction would also qualify as 'aggravated sexual abuse' or 'sexual abuse involving a minor' under the same provision."). To be sure, the defendant acknowledged that his victim had been a minor, 504 F.3d at 739 n.2. But the elements of his Montana prior offense require a minor victim. *Id.* at 741 (citing Mont. Code Ann. § 45-5-502). And the Ninth Circuit clarified that its holding was based solely on the categorical match between § 45-5-502 and the generic federal offense of sexual abuse.

504 F.3d at 744 (in light of categorical holding, it was not "necessary that we examine [the defendant's] conviction under the 'modified' categorical approach"). *See also, e.g., United States v. Wiles*, 642 F.3d 1198, 1202 (9th Cir. 2011) (concluding, without mention of victim's age, that prior conviction for attempted sexual assault under same provision of Montana law at issue in *Sinerius* related to "sexual abuse").

2. **The Eighth Circuit:** In stark contrast, a consistent line of Eighth Circuit decisions indicates that any prior state conviction must, to trigger the enhancement, involve a minor victim. *See, e.g., United States v. Linngren*, 652 F.3d 868, 870 (8th Cir. 2011) (Minnesota criminal sexual conduct statute was categorically "overinclusive," with respect to § 2252(b)(1) predicates, "because it includes acts committed ... against non-minors."); *United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007) (noting that elements of defendant's prior Minnesota incest convictions did not establish that victims were minors and thus looking beyond elements to underlying facts to determine whether enhancement applied); *United States v. Weis*, 487 F.3d 1148, 1152 (8th Cir. 2007) (where victim's age was not element of defendant's prior Iowa conviction for assault with intent to commit sexual abuse, court applied enhancement only after consulting charging document, which established that victim was minor); *United States v. Trogdon*, 339 F.3d 620, 621 (8th Cir. 2003) (where victim's age was not element of defendant's prior Missouri conviction for sexual misconduct, court had to examine underlying

facts to determine whether victim was minor, such that enhancement applied).[4]

a. The clearest and most recent example is *Linngren*. There, the defendant's prior conviction was for fifth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.3451, subdivision 1. 652 F.3d at 870. The Eighth Circuit concluded that the statute was categorically "overinclusive" because it "does not require that the victim be a minor." *Id.* Because one could violate the statute "in ways that would not constitute sexual abuse, that is, the 'physical or nonphysical misuse of a minor for a purpose associated with sexual gratification,'" that statute was not a categorical match. *Id.* (quoting *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009)). Thus, "the statute is overinclusive because it includes acts committed ... against non-minors." *Id.* Only because the complaint indicated that the victim was in fact a minor did the enhancement apply. *Id.* at 871.

Hunter, *Weis*, and *Trogdon* are in accord. In each, the Eighth Circuit refused to apply a sentencing enhancement on the basis of a prior conviction that did not include as an element the victim's age without first establishing through other means that the victim was in fact a minor. In *Hunter*, the court

---

[4] A district court in the First Circuit has taken the same approach. *United States v. Roy*, 114 F. Supp. 2d 1, 1–2 (D. Me. 2000) (prior conviction for unlawful sexual contact under Maine law did not trigger § 2252A(b)(2) enhancement because "neither the judgment following the defendant's guilty plea nor the criminal complaint on which it is based reveals the victim's age and, under the Maine statute of conviction, age of the victim is not a factor").

relied on the defendant's assent to the factual allegation in his PSR that his prior incest convictions involved minors. 505 F.3d at 831. In *Weis*, the court relied on the trial information to which the defendant pleaded guilty to confirm that his conviction for assault with intent to commit sexual abuse involved a minor. 487 F.3d at 1152. And in *Trogdon*, the court once more relied on the information to which the defendant pleaded guilty to establish that the victim of his sexual misconduct conviction was a minor. 339 F.3d at 621. In each case, establishing the victim's minor status was necessary to upholding the application of the enhancement.

b. Below, the court of appeals brushed off *Hunter* with the observation that the Eighth Circuit had adopted the requirement that a predicate involve a minor "without elaborating on [its] reasoning," App. 15, and the Second Circuit declined to follow such "unexplored assumptions." App. 16. Granted, the Eighth Circuit has not articulated the reasons for its interpretation of the enhancement provisions. But it has adhered, without exception, to the position that a predicate must involve a minor in multiple published decisions over more than a decade. And there is no doubt that had he been sentenced in the Eighth Circuit, petitioner would not have been subject to § 2252(b)(2)'s ten-year mandatory minimum. A principal function of this Court's certiorari jurisdiction is "to secure uniformity in the application" of federal law. *Clay v. United States*, 537 U.S. 522, 526 (2003). Thus, even though the Eighth Circuit has not articulated its reasoning, the divergence

between the Eighth Circuit and other circuits on the question presented breeds intolerable conflict and disparate penalties for similarly situated defendants.

Further percolation is unnecessary. The Eighth Circuit has adhered to its interpretation of the penalty provisions notwithstanding contrary decisions from other courts of appeals—most recently in *Linngren*, which postdates *Hubbard*, *Rezin*, and *Sinerius*. Nor does the lopsided nature of the five-to-one split counsel against review. If the Eighth Circuit's interpretation of these statutes is correct, petitioner and many other federal child pornography defendants around the country are being punished much more severely than Congress intended.

3. **The Tenth Circuit**: The Second Circuit described the Tenth Circuit as aligned with the Eighth, i.e., as having "assumed that a prior state-law sexual abuse conviction requires a minor victim." App. 15-16 (citing *McCutchen*, 419 F.3d at 1125). In *McCutchen*, the Tenth Circuit affirmed application of the § 2252(b)(2) enhancement on the basis of a prior conviction for sexual battery under Kansas law, even though the elements of the offense did not include the victim's minor status. *Id.* at 1125-27. The court rejected the defendant's argument that it was limited to considering the statutory elements and, relying on a criminal complaint establishing that the victim was a minor, held the enhancement applicable. *Id.*

As the Second Circuit suggested, *McCutchen* can be read to express the view that a minor victim is required. However, subsequent to *McCutchen*, the Tenth Circuit suggested that the question remains open. *United States v. Becker*, 625 F.3d 1309, 1312 n.3 (10th Cir. 2010). There, after the Fifth Circuit's decision in *Hubbard*, the Tenth Circuit concluded that a prior conviction under Illinois law for indecent solicitation of a child was a qualifying predicate under § 2252(b)(1), even though the defendant solicited an adult undercover agent, not an actual minor. 625 F.3d at 1312–13. That holding embraced *Hubbard*'s point that a defendant who believes he is propositioning a minor has the requisite intent (and thus, the culpability) for a child sexual abuse offense. *Id.* at 1312 (citing *Hubbard*, 480 F.3d at 346). However, the Tenth Circuit did not adopt *Hubbard*'s additional holding that only "abusive sexual conduct" necessitates a minor victim; on the contrary, the Tenth Circuit suggested that it disagreed: "[W]e caution that our opinion today should not be read to endorse the position, also adopted in *Hubbard*, that § 2252(b) 'does not require aggravated sexual abuse or sexual abuse of *a minor*,' and that 'the phrase 'involving a minor' modifies only 'abusive conduct.' This issue—whether the sexual abuse of adults would qualify as a predicate offense under § 2252(b)—is not before us today." 625 F.3d at 1312 n.3 (quoting *Hubbard*, 480 F.3d at 350 (emphasis by the Tenth Circuit)).

In short, while the Tenth Circuit's position appears unsettled, the question presented implicates an acknowledged split between the Second,

Fourth, Fifth, Sixth, and Ninth Circuits on the one hand, and the Eighth Circuit on the other. That five-to-one division merits this Court's intervention.

B. This case is an ideal vehicle and the question is important.

1. This case offers an ideal vehicle for resolving the question presented. In the district court, petitioner objected that his prior New York State conviction did not trigger § 2252(b)(2)'s ten-year mandatory minimum term because the offense involved an adult victim only. App. 22–23. Absent the mandatory minimum, petitioner faced a Guidelines range of 78–97 months, and the district court said nothing to suggest that it would have imposed a 120-month sentence had § 2252(b)(2) not required it. In his plea agreement, petitioner expressly reserved the right to appeal this question, as respondent acknowledged in the court of appeals. App. 6 n.2. Petitioner raised the question presented in the court of appeals, which issued a reasoned published decision, and he sought en banc review.

Moreover, the undisputed nature of petitioner's prior conviction facilitates this Court's review of the question presented. The courts of appeals have taken slightly different approaches to ascertaining the nature of a defendant's prior conviction. For example, the Second and Fourth Circuits have applied the categorical and modified categorical approaches. *See United States v. Beardsley*, 691 F.3d 252, 258 (2d Cir. 2012); *Spence*, 661 F.3d at 199. The Eighth Circuit has adopted a broader inquiry, which "looks to the statute

under which a defendant was previously convicted and then to the facts underlying the offense to determine whether a prior conviction triggers the enhanced penalties." *Weis*, 487 F.3d at 1151 (citing *Trogdon*, 339 F.3d at 621). So has the Tenth Circuit. *McCutchen*, 419 F.3d at 1127 (Congress intended "to allow a sentencing court to look beyond the mere elements of a prior state conviction" in determining applicability of enhancement).

This Court need not wade into that debate (which would benefit from further percolation in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013)), to resolve the question presented here. The elements and the underlying facts of petitioner's prior New York conviction align. Section 130.65(1) of New York's Penal Law does not refer to the victim's age at all. And it is undisputed that the victim was petitioner's 53-year-old girlfriend. Whether one considers elements, *Shepard*-approved documents, or the underlying facts is immaterial. Petitioner's prior conviction involved an adult. Likewise, this case does not present the complication of an adult undercover law enforcement officer pretending to be a minor. *Cf. Becker*, 625 F.3d at 1312–13; *Hubbard*, 480 F.3d at 346. Rather, the victim was, and was known to be, an adult. This petition thus offers a clean opportunity to resolve a straightforward question of statutory interpretation.

2. The question presented is important. About 2,000 defendants were prosecuted in the United States for child pornography offenses in fiscal year 2013. U.S. Sent'g Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*

tbl.13, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table13.pdf. Child pornography defendants, as a group, already receive some of the most severe sentences in the federal criminal justice system. *See id.* (mean sentence of 136 months, longer than all offense categories other than murder, kidnapping, and sexual abuse). The enhancements at issue here have dramatic consequences, increasing mandatory minimum sentences by ten years for all applicable offenses and setting some of the harshest mandatory minimums in title 18 of the U.S. Code. *See, e.g.*, 18 U.S.C. § 2251(e) (increasing mandatory minimum for production of child pornography from 15 to 25 years). Fairness requires the correct and uniform application of such stiff penalties.

C. The decision below is wrong.

This Court should also grant review because the Second Circuit's decision is wrong. The court mistakenly rejected application of the series qualifier canon, which, this Court reiterated as recently as last Term, can overcome the rule of last antecedent "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last." *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) (quoting *Porto Rico Rwy., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)). The court of appeals justified its departure from the most natural reading of the statutory text on the ground that it would be "unreasonable" to attribute to Congress

the intent to treat predicate conduct differently according to whether it constituted a federal or state offense. But Congress did just that elsewhere in these very statutes, evincing a clear intent to limit state-law predicates to offenses against children. Finally, the court of appeals erroneously dismissed legislative history confirming that Congress meant to provide enhanced penalties for defendants with prior convictions under "*State child abuse law[s].*" S. Rep. No. 104-358, 104th Cong., 1996 WL 506545, at *9 (1996) (emphasis added).

1. This Court interprets criminal statutes, like all statutes, according to their plain language and ordinary English usage. *See, e.g., Flores-Figueroa v. United States*, 556 U.S. 646, 650–652 (2009). The plain meaning of the phrase "a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" is that the final phrase, "involving a minor or ward," modifies all three classes of state-law predicates. That reading represents a straightforward application of the series qualifier canon, which directs that a modifying phrase following a "single, integrated list" applies to all elements of the list. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 345 n.4 (2005). *See also, e.g., United States v. Bass*, 404 U.S. 336, 339–40 (1971). For example, in *Bass*, this Court considered a criminal statute that applied to "any person ... who receives, possesses, or transports in commerce or affecting commerce ... any firearm." *Id.* at 337 (quoting former 18 U.S.C. § 1202(a)).

Applying the series qualifier canon, the Court determined that the "'the natural construction of the language' suggests that the clause 'in commerce or affecting commerce' qualifies all three antecedents in the list." *Id.* at 339 (quoting *Mor*, 253 U.S. at 348). That was true, the Court reasoned, because "'in commerce or affecting commerce' undeniably applies to at least one antecedent, and ... makes sense with all three," such that "the more plausible construction here is that it in fact applies to all three." *Id.* at 339–40.

Just last Term, the Court reaffirmed that the series qualifier canon may overcome the rule of last antecedent. *Paroline*, 134 S. Ct. at 1720–21. There, the Court considered 18 U.S.C. § 2259(b)(3), which enumerates categories of losses for which restitution is payable to victims of child pornography offenses. *See* 134 S. Ct. at 1720 ("The statute enumerates six categories of covered losses. These include certain medical services, § 2259(b)(3)(A); physical and occupational therapy, § 2259(b)(3)(B); transportation, temporary housing, and child care, § 2259(b)(3)(C); lost income, § 2259(b)(3)(D); attorney's fees and costs, § 2259(b)(3)(E); and a final catchall category for 'any other losses suffered by the victim as a proximate result of the offense,' § 2259(b)(3)(F)."). The Court rejected the victim's argument, based on the rule of last antecedent, that the clause "as a proximate result of the offense" modified only the last enumerated category, § 2259(b)(3)(F), in which it appeared. 134 S. Ct. at 1720–21. Cautioning that the rule of last antecedent is "not an absolute and can assuredly be overcome

by other indicia of meaning," *id.* at 1721 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)), the Court instead applied the series qualifier canon. The "proximate result" clause modified all the enumerated categories of loss because "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 1721 (quoting *Mor*, 253 U.S. at 348).

The argument for applying the series qualifier canon here is even stronger. In *Paroline*, the elements of the list appeared in separate statutory subparagraphs, § 2259(b)(3)(A)–(E), with the modifying clause in the last subparagraph, § 2259(b)(3)(F). Here, the elements ("aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct") are not separated in that way. And they are related both linguistically and substantively, all dealing with different forms of the same crime, child abuse. The modifying clause "undeniably applies to at least one antecedent" and "makes sense with all three." *Bass*, 404 U.S. at 339–40.

2. The decision below also determined that it would be "unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law." App. 14 (quoting *Spence*, 661 F.3d at 197). Other courts on the long side of the split have made the same point. *See, e.g.*, *Mateen*, 764 F.3d at 631–32; *Hubbard*, 480 F.3d at 350; *Rezin*, 322

F.3d at 448. These decisions fail to recognize that Congress unquestionably intended this very result—that the scope of federal convictions triggering the enhancement would be far broader than the scope of state convictions that do so—and that whether a particular federal conviction is a qualifying predicate says nothing about whether an analogous state law conviction is. Indeed, while the state predicates all involve sexual abuse or child pornography, many federal predicates involve neither, and consequently a defendant may in many cases face the enhancement for a federal conviction but not for a state conviction encompassing the same conduct. *See, e.g.*, 18 U.S.C. §§ 1461–64 (in Chapter 71) (possessing, mailing, transporting, and broadcasting obscene matter); § 1468 (in Chapter 71) (distributing obscene material by cable or subscription television); § 2257 (in Chapter 110) (failing to maintain records for adult pornography); § 2258 (in Chapter 110) (failing to report child abuse, including non-sexual child abuse).

It is also apparent that Congress carefully limited qualifying state offenses to crimes against children, even where an analogous federal crime against adults would be a predicate. For example, §§ 2252(b)(1) and 2252A(b)(1) enhance a defendant's sentencing range if he has a prior conviction under 18 U.S.C. § 1591, a federal sex trafficking statute applicable to adult and minor victims. But §§ 2252(b)(1) and 2252A(b)(1) limit qualifying state predicates to "sex trafficking of children." *See also, e.g.*, § 2251(e) (treating federal offense of sexual exploitation of adults or minors, § 2422 in

Chapter 117, as predicate, but restricting state predicates to those involving "sexual exploitation of children"). In short, there is nothing anomalous about the differential treatment of federal and state offenses that the Eighth Circuit's rule produces. On the contrary, such differential treatment is an unmistakable and intended feature of the penalty provisions.

3. Finally, the court of appeals dismissed without analysis legislative history reflecting that Congress did intend qualifying state-law predicates to be limited to offenses against children. App. 18. The Senate Report on the Child Pornography Prevention Act of 1995, which added the penalty provisions of §§ 2252 and 2252A at issue here, specified that the new enhancements would apply to "a repeat offender with a prior conviction under chapter 109A or 110 of title 18, or under any *State child abuse law* or law relating to the production, receipt or distribution of child pornography." S. Rep. No. 104-358, 104th Cong., 1996 WL 506545, at *9 (1996) (emphasis added).

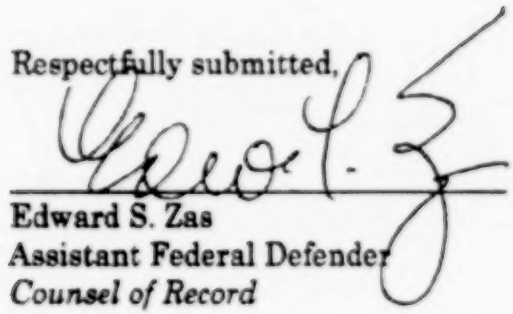
* * *

In summary, this Court's intervention is needed to resolve the existing circuit split and to correct the Second Circuit's mistaken interpretation of the statute.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Edward S. Zas
Assistant Federal Defender
Counsel of Record

Daniel Habib
Assistant Federal Defender

Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
E-mail: Edward_Zas@fd.org
Tel.: (212) 417-8742

Attorneys for Petitioner

APPENDIX

13-602
United States v. Lockhart

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2013

(Argued: January 14, 2014 Decided: May 15, 2014)

Docket No. 13-602-cr

UNITED STATES OF AMERICA,

Appellee,

—v.—

AVONDALE LOCKHART,

Defendant-Appellant.

Before:

KATZMANN, *Chief Judge*, STRAUB and LOHIER, *Circuit Judges*.

Defendant-Appellant Avondale Lockhart appeals from a judgment of conviction and sentence entered by the United States District Court for the Eastern District of New York (Johnson, *J.*), in which the district court applied the sentencing enhancement set forth in 18 U.S.C. § 2252(b)(2), which requires a minimum term of imprisonment of ten years. That enhancement applies when a defendant is found guilty of possessing child pornography and was previously convicted under state law of a crime "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." Because we find that § 2252(b)(2) does not require that a prior state-law aggravated sexual abuse or sexual abuse conviction involve a minor, the judgment of the district court is **AFFIRMED**.

PATRICK S. SINCLAIR (Maria Cruz Melendez and David C. James, *on the brief*), Assistant United States Attorneys, for Loretta E. Lynch, United States Attorney for the Eastern District of New York, Brooklyn, NY, *for Appellee*.

DAVID A. LEWIS, Assistant Federal Public Defender, Federal Defenders of New York, New York, NY, *for Defendant-Appellant*.

KATZMANN, *Chief Judge*:

In this case, we must decide whether a sentencing provision that provides for a ten-year mandatory minimum term of imprisonment if a defendant was previously convicted "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," 18 U.S.C. § 2252(b)(2), requires that an "aggravated sexual abuse" or "sexual abuse" conviction involve a minor or ward, or whether only "abusive sexual conduct" is modified by the phrase "involving a minor or ward," such that a sexual abuse conviction involving an adult victim constitutes a predicate offense. We conclude that the statutory text and structure indicate that the latter reading is correct and therefore affirm the district court's imposition of a ten-year sentence on Defendant-Appellant Avondale Lockhart.

BACKGROUND

In June 2010, after receiving information indicating that Lockhart had transferred money to a distributor of child pornography, federal agents initiated an undercover operation, in which they solicited Lockhart to purchase videos portraying child pornography from an agent-run service. Lockhart requested a number of videos from the agents, and on July 13, 2010, after obtaining a search warrant, the agents conducted a controlled delivery of the package ostensibly containing the videos Lockhart had ordered. Once Lockhart accepted the package, the agents executed the search warrant and seized Lockhart's laptop and external hard drive, which together contained over 15,000 images and at least nine videos depicting child pornography.

As a result of this investigation, Lockhart was indicted on March 24, 2011, on two counts: (1) attempted receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2), based on his attempted purchase of videos containing child pornography from the undercover agents; and (2) possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), based on the images and videos already on his computer and hard drive. On March 6, 2012, pursuant to a plea agreement, Lockhart pleaded guilty to count two of the indictment in the

United States District Court for the Eastern District of New York. Count one of the indictment was thereafter dismissed.

Lockhart had previously been convicted in state court in April 2000 of first degree sexual abuse, in violation of New York Penal Law § 130.65(1). The arrest report from this earlier conviction alleges that Lockhart pinned down his fifty-three-year old girlfriend, ripped off her underpants, and attempted to penetrate her vagina with his penis. Lockhart received a sentence of five years' probation and was classified as a level-one sex offender as a result of this conviction.

The Presentence Report ("PSR") prepared for Lockhart's sentencing calculated a recommended sentencing range of 78–97 months under the U.S. Sentencing Guidelines. However, the PSR adopted the government's position that Lockhart was subject to a mandatory minimum sentence of ten years under 18 U.S.C. § 2252(b)(2), which requires such a term of imprisonment if a person violates § 2252(a)(4) and "has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252(b)(2). The PSR thus recommended an effective range under the Sentencing Guidelines of 120 months due to Lockhart's prior conviction for sexual abuse in the first degree. In his sentencing

submission, Lockhart argued that his prior conviction could not support the imposition of the mandatory minimum sentence because his sexual abuse offense did not involve a minor. The district court rejected Lockhart's position, concluding that the mandatory minimum applied, and imposed a ten-year sentence, to be followed by ten years' supervised release. This appeal followed.

DISCUSSION

As discussed above, Lockhart pleaded guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4) and was sentenced pursuant to § 2252(b)(2). While § 2252(b)(2) generally requires no minimum sentence, in certain circumstances the statute provides for a mandatory minimum sentence of ten years. In its entirety, § 2252(b)(2) provides:

> Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice), or *under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor* or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this

> title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 2252(b)(2) (emphasis added).[1]

Here, the district court found that Lockhart was subject to the mandatory minimum based on his prior state conviction for sexual abuse of an adult woman. On appeal, Lockhart challenges that conclusion, arguing that § 2252(b)(2)'s mandatory minimum does not apply if the victim of the prior sexual abuse offense is an adult, rather than a minor. Thus, the sole issue on appeal is whether the phrase "involving a minor or ward" modifies an entire category of state-law crimes—those "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct"—or whether "involving a minor or ward" modifies only its immediately preceding antecedent, "abusive sexual conduct." "We review de novo all questions of law relating to the district court's application of a federal sentence enhancement." *United States v. Beardsley*, 691 F.3d 252, 257 (2d Cir. 2012).[2]

---

[1] Language identical or similar to the key phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" is used in four other sentencing provisions in Chapter 110 of Title 18 of the United States Code. *See* 18 U.S.C. §§ 2251(e) (referring to "abusive sexual contact," rather than "conduct"), 2252(b)(1), 2252A(b)(1), 2252A(b)(2).

[2] As part of his plea agreement, Lockhart waived his right to appeal his sentence but excluded from that waiver the issue now before the Court. On March 26, 2013, the

In interpreting § 2252(b)(2), "[w]e start, as we must, with the language of the statute," giving the statutory terms their "'ordinary or natural' meaning." *Bailey v. United States*, 516 U.S. 137, 144–45 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)), *superseded by statute on other grounds*, Pub. L. No. 105-386, 112 Stat. 3469 (1998) (codified as amended at 18 U.S.C. § 924(c)). Where, as here, the plain meaning is not pellucid, we can draw upon a variety of interpretive tools, including canons, statutory structure, and legislative history, to discern meaning. As to canons, we first consider which rule of statutory construction should inform our understanding of the phrase "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor": the last antecedent rule or the series qualifier canon.

"Under the last antecedent rule, 'a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *United States v. Kerley*, 416 F.3d 176, 180 (2d Cir. 2005) (ellipsis omitted) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). Although the "rule is not an absolute and can assuredly be overcome by other indicia of meaning," the last

---

government filed a motion to dismiss Lockhart's appeal based on this waiver. However, on July 8, 2013, the government moved to withdraw its motion to dismiss, acknowledging that the instant issue fell outside the scope of the appeal waiver. The Court granted the government's motion to withdraw its prior motion on July 9, 2013. Therefore, waiver is not at issue, and we proceed to the merits of Lockhart's claim.

antecedent rule generally applies absent a contrary indication of meaning. *Barnhart*, 540 U.S. at 26 (citing 2A N. Singer, *Sutherland on Statutory Construction* § 47.33 at 369 (6th rev. ed. 2000)). Relying on this presumption, the government contends that, as the district court concluded, the phrase "involving a minor or ward" modifies only "abusive sexual conduct," and therefore Lockhart's prior state conviction for sexual abuse triggers the imposition of § 2252(b)(2)'s ten-year mandatory minimum sentence, regardless of the fact that the victim of his prior offense was an adult.

Lockhart argues in favor of the application of the contrary series qualifier canon of statutory construction, which "provides that a modifier at the beginning or end of a series of terms modifies all the terms." *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012). The series qualifier canon applies where "[t]he modifying clause appear[s] . . . at the end of a single, integrated list," *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 344 n.4 (2005), and where the modifying clause "undeniably applies to at least one antecedent, and . . . makes sense with all," *United States v. Bass*, 404 U.S. 336, 339–40 (1971). Lockhart contends that this canon should be applied, as the phrase "involving a minor"

appears at the end of the integrated list of three antecedents, all of which would "make[] sense" if limited by this modifying clause.

Lockhart and the government put forth various arguments to support reliance on their preferred canons. We are not fully persuaded that either canon applies unambiguously based on the language and structure of this statutory phrase alone. For example, while Lockhart is correct that the modifying clause "involving a minor" appears at the end of this particular list of state-law crimes, this is not the prototypical situation in which the series qualifier canon is applied, since the list itself falls in the middle of a longer list of qualifying predicate crimes; that is, the modifier does not end the list in its entirety. *Cf. Bass*, 404 U.S. at 337 (applying the series qualifier rule to the phrase "receives, possesses, or transports in commerce or affecting commerce" where that series provided the sole list of conduct prohibited by the statute). On the other hand, the inclusion of the word "or" before "abusive sexual conduct" and then again before "the production . . . of child pornography" in the immediately following clause suggests that the state sexual abuse crimes are set off as a separate list within the larger list, lending some support to Lockhart's preferred reading.[3]

---

[3] Although we do not deem this dispositive on its own, we note that 18 U.S.C. § 2251(e)'s similar language differs from that used in § 2252(b)(2) in a manner that sheds

We are not persuaded by Lockhart's position that the three types of state sexual abuse offenses constitute a related "continuum of conduct," each element of which should be modified by the phrase "involving a minor" to maintain a common limitation on the entire continuum. Br. for Def.-Appellant at 20. Such a reading would eliminate any distinction between "sexual abuse involving a minor" and "abusive sexual conduct involving a minor," since "abusive sexual conduct involving a minor" seemingly would encompass anything that constitutes "sexual abuse involving a minor," as well as, for example, other sexual conduct that may be criminalized only when the victim is a child. *See, e.g.*, *United States v. Hubbard*, 480 F.3d 341 (5th Cir. 2007) (finding a conviction for "soliciting sex from a person the Defendant believed to be under sixteen" to constitute a conviction relating to "abusive sexual conduct involving a minor"). Thus, Lockhart's proposed reading may run up against the principle of statutory

---

some light on the present dispute. Specifically, § 2251(e) imposes a heightened sentence on defendants convicted of prior crimes "under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production . . . of child pornography." In this context, aggravated sexual abuse, sexual abuse, and abusive sexual conduct do not form their own separate list ending in a common modifier; rather, "abusive sexual contact involving a minor or ward" is the third element of a four-element list ending in "sex trafficking of children." We assume that Congress intended § 2251(e)'s similar language to be read in tandem with § 2252(b)(2). Thus, the addition of a fourth element in § 2251(e) after the modifier suggests that the series qualifier canon should not be applied.

interpretation that "[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Bailey*, 516 U.S. at 146.

At the same time, neither are we convinced by the government's contention that the fact that there is no comma separating "abusive sexual conduct" from the modifier "involving a minor or ward" itself proves that "involving a minor or ward" should be read together with "abusive sexual conduct," but not with "aggravated sexual abuse" or "sexual abuse." We have previously acknowledged that "[o]ne of the methods by which a writer indicates whether a modifier that follows a list of nouns or phrases is intended to modify the entire list, or only the immediate antecedent, is by punctuation—specifically by whether the list is separated from the subsequent modifier by a comma." *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781–82 (2d Cir. 2013). However, while a comma may be a helpful aid to statutory interpretation, inclusion of such a comma is not a hard-and-fast rule of grammar. *See Bass*, 404 U.S. at 340 n.6 ("[M]any leading grammarians, while sometimes noting that commas at the end of series can avoid ambiguity, concede that use of such commas is discretionary."). Here, inserting a comma before "involving a minor or ward"

might confuse rather than clarify the meaning of this provision because, as discussed above, the relevant series of state sexual abuse offenses is separated only by a comma from a continuing list of state child pornography offenses. In this case, then, adding a comma before "involving a minor or ward" might make the modifying clause appear to be a separate element in a longer list and would, in any case, be grammatically unnecessary. Accordingly, here, basing our analysis "only on punctuation is necessarily incomplete and runs the risk of distorting [the] statute's true meaning." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). While the lack of a separating comma may run contrary to Lockhart's interpretation, it is not dispositive of our reading of § 2252(b)(2). *See United States v. Rezin*, 322 F.3d 443, 448 (7th Cir. 2003).

Ultimately, we cannot definitively determine by applying the canons whether the phrase "involving a minor or ward" modifies the entire category of state-law sexual abuse crimes or only "abusive sexual conduct." While the government's reading appears to have greater support in the relevant clause, lingering ambiguity prevents us from concluding on this basis alone that the government's interpretation is the correct one. However, this ambiguity does not end our inquiry into the meaning of the statutory text. Rather, it is well

established that statutory phrases should not be construed "in isolation; we read statutes as a whole." *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)).

Accordingly, we look to the remainder of § 2252(b)(2) and consider whether its overall scheme may shed light on what state-law sexual abuse offenses Congress intended to include as predicate offenses for imposition of the mandatory minimum sentence. In addition to imposing a ten-year term of imprisonment for predicate violations of state law, § 2252(b)(2) also provides for such a sentence if the defendant has a prior conviction under federal law for a violation under "[chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice)." The referenced statutes prohibit sexual conduct, including conduct that may have both minor and adult victims. *See* 18 U.S.C. §§ 1460–1470 (Chapter 71, offenses relating to obscene matter, materials or language); 18 U.S.C. §§ 2241–2248 (Chapter 109A, sexual abuse of adults or minors); 18 U.S.C. §§ 2251–2260A (Chapter 110, sexual exploitation and other abuse of minors); 18 U.S.C. §§ 2421–2428 (Chapter 117, transportation of adults or minors for illegal sexual activity and related crimes); 10 U.S.C. § 920 (rape and sexual assault under the Uniform

Code of Military Justice). Importantly, § 2252(b)(2) does not specify that a conviction under a federal statute must involve a minor; a violation of any of these statutory provisions constitutes a predicate offense for the application of § 2252(b)(2)'s mandatory minimum sentence, regardless of the age of the victim.

Looking at § 2252(b)(2) as a whole, we find, as a number of other circuits have explained, that "it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law." *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011); *see also Hubbard*, 480 F.3d at 350 ("Read in context, the phrase 'involving a minor' modifies only 'abusive conduct.' We are persuaded this was the intent of Congress, not simply because of the placement of the phrase 'involving a minor,' but because the enumeration of prior federal offenses that will also give rise to a mandatory minimum sentence expressly includes sexual abuse of adults or minors."); *Rezin*, 322 F.3d at 448 ("[I]t would have been strange had Congress on the one hand authorized heavier punishment for offenders who had a prior *federal* conviction for a sexual crime whether or not it involved a minor, and on the other hand insisted that if the prior conviction had been for a state offense, even one identical to one of the

enumerated federal offenses, the victim had to be a minor."); *cf. United States v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007) (assuming, without analysis, that "the terms 'aggravated sexual abuse,' 'sexual abuse,' and 'abusive sexual conduct involving a minor' under § 2252A(b)" set forth distinct offenses); *United States v. West*, 333 F. App'x 494 (11th Cir. 2009) (per curiam) (holding that it was not plain error to apply the mandatory minimum to a prior conviction where the state law at issue did not always require an actual minor victim). This reasoning compels us to conclude that "involving a minor or ward" modifies only prior state convictions for "abusive sexual conduct," not those for "sexual abuse" or "aggravated sexual abuse," each of which would constitute a predicate *federal* offense if committed against an adult or a child.

We acknowledge that the Sixth, Eighth and Tenth Circuits have reached the opposite conclusion, namely, that the phrase "involving a minor or ward" modifies all three categories of state sexual abuse crimes. However, the Eighth and Tenth Circuits have drawn this conclusion without elaborating on their reasoning. Indeed, these circuits appear merely to have assumed that a prior state-law sexual abuse conviction requires a minor victim for purposes of the sentencing enhancement, an assumption that made little difference in those cases

since the predicate violations at issue involved minor victims. *See United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007) (relying on this assumption); *United States v. McCutchen*, 419 F.3d 1122, 1125 (10th Cir. 2005) (considering whether "the statute under which [a] prior state conviction arose must have included as an element the victim's status as a minor" for the conviction to fall within the scope of any of the three categories in § 2252(b)(2)). The Sixth Circuit has reached this conclusion most explicitly, although it did so because it found that another panel of that court had "already considered the proper construction of the statutory language at issue," and that that prior decision bound the current panel, even though the earlier opinion did not engage in any express analysis of the statutory language. *United States v. Mateen*, 739 F.3d 300, 304–05 (6th Cir. 2014) (citing *United States v. Gardner*, 649 F.3d 437 (6th Cir. 2011)), *reh'g en banc granted, opinion vacated* (Apr. 9, 2014). We are not compelled to follow such unexplored assumptions in coming to our conclusion here.[4]

---

[4] In *United States v. Beardsley*, 691 F.3d 252 (2d Cir. 2012), this Court commented that for a state-law conviction to trigger the analogous sentencing enhancement under 18 U.S.C. § 2252A(b)(1), "the statute underlying the prior conviction must itself relate to sexual abuse of minors for the enhancement to apply." *Id.* at 269. However, this statement is dictum and does not bind this panel. At issue in *Beardsley* was whether to take a categorical approach in determining whether a state-law conviction for endangering the welfare of a child was a predicate offense under § 2252A(b)(1) sentencing enhancement. Beardsley's actual conduct underlying the conviction constituted "abusive sexual

Resisting the conclusion that Congress intended to treat state and federal predicate crimes similarly, Lockhart argues that the relevant pattern in § 2252(b)(2) is instead that Congress limited other state-law predicate offenses in this and related sentencing provisions to those involving children. *See, e.g.*, 18 U.S.C. § 2252(b)(2) (including state offenses relating to "child pornography"); 18 U.S.C. § 2251(e) (including state offenses relating to "sex trafficking of children"). According to Lockhart, then, not reading "aggravated sexual abuse" and "sexual abuse" to be limited to those convictions "involving a minor or ward" would create an inconsistency among the treatment of different state-law offenses. While there is some logic to this position, we do not think that this theory is more reasonable than the assumption that Congress would intend for courts to treat prior sexual abuse convictions similarly, regardless of whether the conviction was under federal or state law. Lockhart's interpretation is further undermined when one compares the language used to describe the universe of state sexual

---

conduct involving a minor," so that case turned on the scope of the conduct prohibited by the statute, not whether the conviction must involve a minor. *See id.* at 256. This understanding of *Beardsley* was confirmed in a recent decision of this Court, in which we stated that "[w]e did not expressly identify in *Beardsley* that the three types of predicate offenses are distinct, nor did we address whether the phrase 'involving a minor or ward' modifies only 'abusive sexual conduct' as other Courts of Appeals have done." *United States v. Barker*, 723 F.3d 315, 322 (2d Cir. 2013) (per curiam). Thus, we are not bound by *Beardsley*'s suggestion that "involving a minor" modifies each term.

abuse convictions in § 2252(b)(2) with the federal analogs in 18 U.S.C. §§ 2241 (aggravated sexual abuse), 2242 (sexual abuse), and 2243 (sexual abuse of a minor or ward). Under the federal statutory scheme, adult and minor victims are included under the first two provisions, while § 2243 covers only minors and wards. Although the language used in § 2252(b)(2) is not identical to these statutory titles, it nonetheless suggests that Congress intended to impart a similar structure to state-law predicate offenses for purposes of this sentencing enhancement, and the pattern Lockhart perceives among other state-law offenses does not necessarily apply here.

We furthermore note that the brief legislative history of this provision does not alter our conclusion. *See* S. Rep. No. 104-358, 104th Cong., 1996 WL 506545, at *9 (1996) (stating only that the penalties under §§ 2252 and 2252A would provide for a mandatory minimum sentence for "a repeat offender with a prior conviction under chapter 109A or 110 of title 18, or under any State child abuse law or law relating to the production, receipt or distribution of child pornography"). Likewise, resort to the rule of lenity is inappropriate where, as here, "the statutory text allows us to make far more than 'a guess as to what

Congress intended.'" *DePierre v. United States*, 131 S. Ct. 2225, 2237 (2011) (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995)).

Accordingly, because we conclude that "involving a minor or ward" modifies only "abusive sexual conduct" and not "sexual abuse" or "aggravated sexual abuse," we find that the district court correctly applied § 2252(b)(2)'s sentencing enhancement in light of Lockhart's prior conviction for sexual abuse.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the district court are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of October, two thousand fourteen,

---

United States of America,

Appellee,

v.

Avondale Lockhart,

Defendant - Appellant.

ORDER
Docket No.: 13-602

Appellant Avondale Lockhart filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA, :
:
Plaintiff, : 11-CR-231
:
-against- : United States Courthouse
: Brooklyn, New York
AVONDALE LOCKHART, :
:
Defendant. : February 1, 2013
: 9:30 a.m.
- - - - - - - - - - - - - - - X

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE STERLING JOHNSON, JR.
UNITED STATES DISTRICT SENIOR JUDGE

APPEARANCES:

For the Plaintiff: LORETTA E. LYNCH, ESQ.
United States Attorney
BY: MARIA CRUZ MELENDEZ, ESQ.
Assistant United States Attorney

For the Defendant: FEDERAL DEFENDERS
BY: MILDRED WHALEN, ESQ.

Probation: MARY ANN BETTS

Court Reporter: FREDERICK R. GUERINO, C.S.R.
225 Cadman Plaza East
Brooklyn, New York
(781) 613-2503

Proceedings recorded by mechanical stenography, transcript produced by CAT.

THE COURT CLERK: United States of America v. Lockhart.

THE COURT: Note your appearances.

MS. MELENDEZ: Good morning, your Honor.

Maria Cruz Melendez for the government. With me here from the Probation Department is Mary Ann Betts.

MS. BETTS: Good morning, your Honor.

MS. WHALEN: Good morning, your Honor.

Federal Defenders of New York by Mildred Whalen for Mr. Lockhart.

THE COURT: Mr. Lockhart, have you read and discussed the presentence report with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Are you ready for sentence?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Let me address some of the legal matters that have been presented to me by the lawyers.

First order of business, let the record reflect that I am in possession of a transcript of a plea by this defendant before Magistrate Judge Go on March 6, 2012, and I accept the plea.

Secondly, I like to state I adopt the finding in the presentence report made by the Probation Department.

One of the main objections by the defendant is the issue of the mandatory minimum that the government says is

applicable in this situation, and Ms. Whalen, as usual, is a good lawyer and puts in some very, very good papers. You state or she states, basically, that 18 2252(b)(2) is inapplicable because she states that defendant did not have sexual conduct involving a minor; is that correct?

MS. WHALEN: The prior conviction is not for sexual conduct involving a minor.

THE COURT: And I'm ruling that the plain reading of the statute negates that particular position. The defendant was convicted in state court. When was it, 2000 --.

MS. MELENDEZ: 1999, your Honor.

THE COURT: In 1999, and the situation was where he pinned down a former girlfriend and attempted to place his penis in her vagina. He was convicted of that and received five years probation. That fits within that part of the statute that speaks of a state conviction for aggravated sexual abuse.

Secondly, there is an Eighth Amendment claim.

MS. WHALEN: Yes, Your Honor.

THE COURT: And I will deny that because I think that the statute created by Congress has a legitimate purpose, and it's not unconstitutional.

The guideline range in this particular case is 78 to 97 months. The maximum statute calls for 240 months, but the mandatory minimum, which is triggered by the aggravated

sexual abuse after a conviction, is 120 months, which is below the 240 months.

I think, thirdly, Ms. Whalen raises the issue of United States v. Dorvee. This is a different kettle of fish. In Dorvee, the court referred to a situation where the enhancement created a situation where the sentence was greater than the mandatory minimum. In this situation, there is no exceeding the mandatory minimum, therefore, I hold that Dorvee does not apply.

Now, any other objection, Ms. Whalen?

MS. WHALEN: No, Your Honor.

THE COURT: Now, do you agree with the guideline range?

MS. WHALEN: Your Honor, I object to the guideline range as set forth.

THE COURT: I understand that and that's on the record.

MS. WHALEN: But given the court's analysis, I understand that the applicable guideline range would be 120 months.

THE COURT: Okay. Now I will ask Mr. Lockhart, do you wish to say something?

THE DEFENDANT: I just want to say I'm sorry for what I did. I didn't mean to hurt anyone. I was recovering from my kidney transplant and I bought a computer, my first

computer, and I ended up on one of those sites. I'm sorry.

THE COURT: Okay. Ms. Whalen?

MS. WHALEN: Your Honor, I think that the mandatory minimum sentence of 120 months would be more than sufficient to achieve the goals of sentencing. I would like to address the medical issues after or I can address them now, if the court wants, in terms of surrender, and my conversations with the Bureau of Prisons about taking care of Mr. Lockhart's medical condition.

THE COURT: Okay. I received something from the government in which -- and maybe -- is it Ms. Melendez?

MS. MELENDEZ: Yes, Your Honor?

THE COURT: I haven't messed your name up yet.

MS. MELENDEZ: Well, technically, your Honor, it is Cruz Melendez, but I answer by Ms. Melendez as well.

THE COURT: Well, I messed it up. Welcome to the club.

Ms. Cruz Melendez sent me a letter. I assume that you got a copy of it. I think it was dated January 17th.

MS. WHALEN: Yes, Your Honor. And when we were last before the court on the 18th, I asked for an opportunity to speak with the Bureau of Prisons about the issue of a lack of a drug called Myfortic which prevents rejection of a transplanted kidney. So Ms. Cruz Melendez provided me Joyce Horikawa's telephone number at the Bureau of Prisons. Ms.

Sullivan actually wrote the letter that is attached to the government's January 17th letter, but she is the regional director, and Ms. Horikawa is above her in terms of the Bureau of Prisons.

So when I talked to Ms. Horikawa, I was talking to her about whether or not we can have an examination, because the doctor in the Bureau of Prisons has to actually prescribe the drugs for Mr. Lockhart. So I was asking if there was a way we could arrange for him to appear at the prison, but not actually be designated until they got his medication. What Ms. Horikawa said is that she said that once we receive notification of Mr. Lockhart's designation - and I think everybody agrees that he should self-surrender - she told me that based on his records, he will be designated to what is called a Category Care Level Three Bureau of Prisons in terms of medicine.

THE COURT: Is that Butner?

MS. WHALEN: Either could be Butner. I think it could be Devins. I think it could be Minnesota. There are a couple of them nationwide. She said that once we were notified of the actual designation, we should then forward a complete set of my client's medical records to her. She would then send them to the regional director.

She also said that given the fact that some of his medication was not on formulary, they would allow him to

bring a seven-day supply of medication. She said that they now had a 36-hour turnaround for non-formulary medication, but a seven-day supply would cover him in case there were any delays. Then we would also provide them with the name and the contact number of his treating physician to get additional information.

She suggested a Monday, not this Monday, but in the future a Monday surrender date.

THE COURT: I'm going to allow him to surrender, and it will probably be a couple of months.

MS. WHALEN: Okay. I think my understanding is designations are usually taking like one to two months. And since we have to give them the additional medical records, I would ask -- we'll have everything ready to go as soon as the designation is made. So maybe like two and a half months and then we can have two weeks afterwards?

MS. BETTS: The Probation Department would like to state we've had an ongoing problem in this district and other federal courts of suicides after sentencing, but before designation for sex offenders. We'll do everything in our power to expedite all the documents and the judgment and everything sent to the Bureau of Prisons official designation ASAP, and that designation could be as brief as possible because of problems with depression and suicide potential.

MS. WHALEN: Mr. Lockhart is in counseling and he's

under electronic monitoring. He lives with another individual, so he's not someone who has extended periods on his own. He's been in counseling, both religious and mental health, addressing this issue. So an expedited date is fine. It's just that if we can set it out for a month.

THE COURT: I will set it out for at least two months, and I would suggest that you work with Ms. Cruz Melendez and Ms. Betts, and we can work something out.

MS. WHALEN: Okay.

THE COURT: I agree that I think the mandatory minimum is sufficient, after considering the factors in 3553(a). So I will sentence the defendant to the custody of the Attorney General or his duly authorized representative for a period of 120 months. $100 special assessment.

What is the supervised release?

MS. BETTS: Any amount of years to life. We had recommended ten.

THE COURT: Ten years supervised release.

I'm also going to recommend mental health and treatment for the defendant while in the custody of the Bureau of Prisons. And as a condition of his supervised release, the Probation Department asks that I include in the J & C a treatment program for sexual disorders, and recommend that the defendant participate in the polygraph examination to obtain information necessary for risk management and

correctional treatment.

The defendant will not associate with any children under 18, unless a responsible adult is present and he has prior approval from the Probation Department.

The defendant must register as a sex offender

MS. MELENDEZ: Your Honor, the government asks that as part of the defendant's sentence, the court pronounce the forfeiture of particular items that contain child pornography, being a Hewlett Packard G-60 laptop computer, and Toshiba 500 gigabyte external hard drive that were seized from the defendant

THE COURT: Any objection?

MS. WHALEN: We consented to the seizure of those items or the forfeiture of those items

THE COURT: Okay. They will be forfeited.

Do I have to sign an order?

MS. MELENDEZ: Yes, your Honor. I believe an order was provided, but I have a copy here. We ask that the order be attached to the J & C.

THE COURT: What we can do is to -- today's the 1st, right?

MS. MELENDEZ: Yes, Your Honor.

MS. BETTS: Yes.

THE COURT: What we can do is make a copy of this, Ana, and give a copy to Ms. Whalen and to Ms. Cruz Melendez,

and then attach a copy to the J & C.

Are there any open counts?

MS. MELENDEZ: Yes, Your Honor, and the government would move to dismiss those counts.

THE COURT: They will be dismissed.

MS. BETTS: The Probation Department would want to inquire with the court if the court would consider a special condition that the defendant not use a computer internet capable device to access pornography of any kind. The definition of pornography being defined in Title 18 United States Code, Section 2256(2), and shall cooperate with the Probation Department Computer and Internet Monitoring Program to remotely access any computer device.

THE COURT: As a condition of supervised release?

MS. BETTS: Correct.

THE COURT: I will make that recommendation and put it in the J & C.

MS. WHALEN: Your Honor, I haven't done the research with respect to the regular pornography, whether or not that's a constitutional condition.

THE COURT: I think the recommendation is for child pornography. It didn't say regular pornography.

MS. BETTS: It was including regular pornography of any kind.

THE COURT: But constitutionally he can see regular

pornography, can't he?

MS. BETTS: It's opposed to treatment plans for sex offender treatment. It doesn't support the treatment plans for sex offender mental health treatment.

MS. WHALEN: If that's a condition of the mental health treatment, maybe we can make it -- if the mental health treatment plan requires no pornography, then that could be a condition of his supervision, because that would be the condition of the mental health treatment?

MS. BETTS: That's feasible, yes.

THE COURT: Will you draft some language, you and Ms. Whalen, and give it to Ana so that she can include it in the
J & C?

MS. BETTS: Yes

MS. WHALEN: So the surrender date would be?

THE COURT: And you will be in touch with the government, when I say the government, I mean Ms. Cruz Melendez, with the prosecutor, and probation.

MS. WHALEN: As well as Ms. Horikawa in the Bureau of Prisons.

THE COURT: Okay.

THE COURT CLERK: April 1st surrender date by I believe it's noon. And it's going to be surrender to the institution?

MS. WHALEN: It will be surrender to the institution.

THE COURT: Okay. Any open counts?

MS. MELENDEZ: Not any more, your Honor. The government moved to dismiss the counts. I believe your Honor ordered that they be dismissed.

THE COURT: Okay. Have a good day.

MS. MELENDEZ: Thank you, Judge.

MS. WHALEN: Thank you.

(The sentencing is concluded.)

AO 245B (Rev. 10/2011 EDNY) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA
v.
AVONDALE LOCKHART

JUDGMENT IN A CRIMINAL CASE

Case Number: 11-CR-0231-SJ

USM Number: 78979-053

Mildred Whalen, One Pierrepont Plz, Bklyn NY 11201
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) two of a two-count indictment.

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty. The Court accepts the plea taken before Magistrate Judge Go on 3/6/2012.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18USC2252(a)(4) and (b)(2)	Possession of child pornography	7/13/2011	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) all open ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/1/2013
Date of Imposition of Judgment

/s/(SJ)
Signature of Judge

STERLING JOHNSON, JR., U.S.D.J.
Name of Judge Title of Judge

A TRUE COPY
ATTEST
DATE 2/11/2013
DOUGLAS C. PALMER
CLERK
BY
DEPUTY CLERK

APP33

AO 245B (Rev. 09/11) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One hundred twenty (120) months.

☑ The court makes the following recommendations to the Bureau of Prisons:

Designation to a Care Level III medical facility close to the state of Florida. Defendant is also to receive mental health treatment and treatment for sexual disorders.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ _____.

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 4/1/2013.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Ten (10) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the pro bation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

notification is not possible, then within forty eight hours after such change;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreem ent to act as an informer or a special agent of a law enforcem ent agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notif third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall perm it the probation officer to m ake such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

SPECIAL CONDITIONS OF SUPERVISION

- the defendant is not to use a computer, Internet capable device, or similar electronic device to access pornography of any kind while in sex offender treatment, unless permitted by the sex offender treatment program. The term "pornography" shall include images or video(s) of adults or minors engaged in "sexually explicit conduct" as that term is defined in Title 18, United States Code, Section 2256(2). The defendant shall also not use a computer, Internet capable device or similar electronic device to view images of naked children. The defendant shall not use his/her computer to view pornography or images of naked children stored on related computer media, such as CD's or DVD's, and shall not communicate via his/her computer with any individual or group who promotes the sexual abuse of children. This condition is recommended due to the conduct comprising the instant offense, and the type of treatment in which the defendant will be engaged during his term of supervised release. Specifically, while participating in sex offender specific mental health treatment, viewing pornography of any kind, including naked children, can be detrimental to and undermine the objectives of treatment. Moreover, should sex offender specific mental health treatment be paired with therapeutic polygraph examinations, viewing pornography of any kind, including images of naked children, can interfere with the testing objectives, eliciting inconclusive test results, again undermining rehabilitation and treatment, which are fundamental goals of sentencing and supervised release. Therefore, while in sex offender mental health treatment, if it is a condition of treatment that the defendant not view adult pornography, i.e., images or video(s) of adults engaged in "sexually explicit conduct" as that term is defined in Title 18, United States Code, Section 2256(2) or naked children, if the defendant views such pornography or images of naked children it will be considered a violation of the conditions of his sex offender mental health treatment and his supervised release. The viewing of child pornography at any time during supervised release will be considered a violation of supervised release as well as a violation of law.

- the defendant shall also cooperate with the U.S. Probation Department's Computer and Internet Monitoring program. Cooperation shall include, but not be limited to, identifying computer systems, Internet capable devices, and/or similar electronic devices the defendant has access to, and allowing the installation of monitoring software/hardware on said devices, at the defendant's expense. The defendant shall inform all parties that access a monitored computer, or similar electronic device, that the device is subject to search and monitoring. The defendant may be limited to possessing only one personal Internet capable device, to facilitate our department's ability to effectively monitor his/her Internet related activities. The defendant shall also permit random examinations of said computer systems, Internet capable devices, similar electronic devices, and related computer media, such as CD's, under his/her control.

Defendant shall participate in a mental health treatment program, which may include participation in a treatment program for sexual disorders, as approved by the Probation Department. The defendant shall contribute to the cost of such services rendered and/or any psychotropic medications prescribed to the degree he is reasonably able, and shall cooperate in securing any applicable third-party payment. The defendant shall disclose all financial information and documents to the Probation Department to assess his ability to pay. As part of the treatment program for sexual disorders, the defendant shall participate in a polygraph examination(s) to obtain information necessary for risk management and correctional treatment.

Defendant shall not associate with any child(ren) under the age of 18, unless a responsible adult is present and he has prior approval from the Probation Department.

Defendant shall comply with the sex offender registration requirements mandated by law.

The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found; the search must also be conducted in a reasonable manner and at a reasonable time; failure to submit to a search may be grounds for revocation; the defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

If deported, the defendant may not re-enter the United States illegally.

The defendant shall not possess a firearm, ammunition, or destructive device.

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

(a) a Hewlett Packard g80 laptop computer; and (b) a Toshiba 500 GB external hard drive.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

Judgment—Page 7 of 7

ADDITIONAL FORFEITED PROPERTY

SEE ATTACHED FINAL ORDER OF FORFEITURE: (a) a Hewlett Packard g60 laptop computer; and (b) a Toshiba 500 GB external hard drive.

SLR:LDM:CSK
F#: 2011R00117

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

-against-

AVONDALE LOCKHART,

Defendant.

- - - - - - - - - - - - - - - - - - - X

FINAL ORDER OF FORFEITURE

CR-11-231 (SJ)

WHEREAS, on or about March 6, 2012, the defendant, AVONDALE LOCKHART, entered a plea of guilty to Count Two of an Indictment charging a violation of 18 U.S.C. § 2252(a)(4)(B); and

WHEREAS, the defendant consented to the forfeiture of all his right, title and interest in the following items: (a) a Hewlett Packard g60 laptop computer; and (b) a Toshiba 500 GB external hard drive, seized from the defendant (the "Forfeited Property"), pursuant to 18 U.S.C. § 2253, as property that constitutes (a) any visual depiction described in 18 U.S.C. §§ 2251, 2251A, 2252, 2252A, 2252B or 2260, and any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped and received in violation of the offenses charged; (b) any property, real and personal, constituting or traceable to gross profits and other proceeds obtained from such offenses; and/or (c) any property, real and personal, used or intended to be used to commit or to promote the commission of said offenses or property traceable

to such property, as well as all substitute assets, pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p);

WHEREAS, on or about March 21, 2012, this Court entered a Preliminary Order of Forfeiture, pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p), requiring the defendant to forfeit all his right, title and interest in the Porfeited Property;

WHEREAS, legal notice of forfeiture was published in this district on the official government website, www.forfeiture.gov, for at least thirty (30) consecutive days beginning on April 17, 2012 and ending on May 16, 2012; and

WHEREAS, no third-party has filed with the Court any petition or claim in connection with the Forfeited Property, and the time to do so under 21 U.S.C. § 853(n)(2) has expired;

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED, on consent as follows:

1. Pursuant to Fed. R. Crim. P. 32.2(c)(2), the Preliminary Order of Forfeiture previously entered by this Court is hereby made a Final Order of Forfeiture.

2. All right, title and interest in the Forfeited Property is hereby forfeited to the United States pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p).

3. The United States Marshals Service and/or the United Postal Investigation Service and its duly authorized agents and contractors are hereby directed to dispose of the Forfeited Property in accordance with all applicable laws and rules.

4. The United States District Court for the Eastern District of New York shall retain jurisdiction in this case for the purpose of enforcing this Order.

5. Pursuant to Fed. R. Crim. P. 32.2(b)(4)(a) and (c), this Final Order shall become final as to the defendant at the time of sentencing and shall be made part of the defendant's sentence and included in the judgment of conviction.

6. The Clerk of the Court is directed to send, by inter-office mail, four certified copies of this Final Order to the United States Attorney's Office, Eastern District of New York, ATTN: Maritza Arroyo, FSA Paralegal, 271 Cadman Plaza East, 7th Floor, Brooklyn, New York 11201.

Dated: Brooklyn, New York
~~January~~ Feb 1, 2013

SO ORDERED:

HONORABLE STERLING JOHNSON, JR.
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK